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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 1150

DAVID H. DURHAM, et al.,

Petitioners

v.

THE MASON AND DIXON LINES, INC.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No.

DAVID H. DURHAM, et al.,

Petitioners

v.

THE MASON AND DIXON LINES, INC.,

Respondent

Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review a judgment of that Court, entered on December 12, 1968, affirming an order of the District Court dismissing petitioners' complaint for "failure to exhaust the grievance procedure" (App. 2a).

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (App. 1a-3a) is reported at 404 F.2d 864. The District Court's order of dismissal (App. 4a) is not reported.

JURISDICTION

The decision of the court below was entered on December 12, 1968. This Court has jurisdiction under 62 Stat. 928, 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the exhaustion doctrine bars suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, on a claim that the employer obtained Joint Committee approval of a contract amendment by fraud, unless the fraud claim is presented to the Joint Committee?

2. Whether employees aggrieved by amendment of a contract, allegedly obtained by employer fraud, are required to seek relief from the Joint Committee before invoking Section 301?

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, reads as follows:

> Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioners, employees of Mason and Dixon Lines, hereinafter the Company, brought suit under Section 301 to invalidate a certain "Change of Operations" approved by the

Central States Joint Area Committee,[1] on the ground that approval was obtained through fraudulent misrepresentations by the Company to the employees' bargaining agents (J.A. 9a, 13a), and that the Change deprived petitioners of vested seniority rights under the governing collective bargaining contract (J.A. 8a, 13a-14a).

This District Court dismissed the suit without stating any reasons (App. 4a). The Court of Appeals affirmed on the ground (App. 2a-3a) that by failing to present to the Joint Committee their claim that "its approval [of the Change] was procured by means of fraudulent misrepresentations on the part of" the company, petitioners were in default under the "general rule" of *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652, that "prior to filing an action in a federal court under Section 301 employees must attempt to use the grievance procedure agreed to by the employer and the union."

REASONS FOR GRANTING THE WRIT

Application of the exhaustion doctrine to a claim of fraud is as unprecedented as it is unwarranted; here, as in *Glover v. St. Louis-San Francisco R.R. Co.*, No. 38, this Term, decided January 14, 1969, 89 S. Ct. 548, certiorari should be granted and the judgment reversed to preserve the rights of employees under collective bargaining agreements against superfluous obstacles and unnecessary delay.

Glover, which was announced after the decision of the Court of Appeals herein, arose under § 3 of the Railway

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[1] The court below correctly described the Change as a "change in the collective bargaining agreement" (App. 1a). There is no question but that, if contractual procedures are followed and absent fraud or bad faith, the Joint Committee is empowered to amend the contract during its life. See Mr. Justice Goldberg's concurring opinion in *Humphrey v. Moore*, 375 U.S. 335, 355. Petitioners also alleged, however, that this change was defective for want of requisite notice to and ratifying vote of the unit affected (J.A. 7a-8a).

Labor Act, 45 U.S.C. § 153(i); but this Court assimilated the exhaustion requirements under that Act (and the exceptions thereto) to those under § 301 of the LMRA. Here, as in *Glover* "doctrinaire application of the exhaustion rule would defeat the overall purposes of federal labor policy." 89 S.Ct. at 551.

1. *Republic Steel v. Maddox*, 379 U.S. 650, 653, holds the exhaustion requirement applicable only to the "normal situation," *i.e.*, where the grievance is based "simply on the contract," *ibid.*, at 657. Accord: *Vaca v. Sipes*, 386 U.S. 171, 185. Extension of the requirement to a claim that either the union or the employer obtained an amendment or interpretation of the contract by fraud is unjustified by anything in the *Maddox* opinion.

2. The court below treats *Maddox* as having reversed *Humphrey v. Moore*, 375 U.S. 335, *sub silentio*. In *Humphrey*, Moore, et al., Dealers' employees, brought suit to set aside a "dovetailing" award which, they alleged, was a product of the Union's breach of good faith and fair dealing, and in excess of the Joint Committee's powers under the contract. *Neither claim had ever been presented to the Union or to the Joint Committee by Dealers' employees.* This Court held that the state courts had properly asserted jurisdiction under Section 301 and adjudicated the claims on the merits, because, if valid, the claims "would effectively undermine the decision of the Joint Committee." 375 U.S. at 343.

It is true, of course, that, in *Humphrey*, the exhaustion claim was neither raised nor considered, but the omission can hardly be attributed to oversight; it demonstrates, rather, universal recognition that the exhaustion principle is irrelevant to claims of "undermining" based on fraud or unfair dealing.

The only distinction between this case and *Humphrey*[2] is that there fraud was attributed to the Union; here to the employer. That, we submit, is a distinction without a difference. Indeed, as we read *Humphrey*, if fraud had been charged against the employer, the individuals' right to relief under Section 301 would have been even clearer. 375 U.S. at 343, 357.

The rationale of the court below is that the Joint Committee is entitled in the first instance to pass upon claims that its action is "undermined" by fraud practiced upon it by a party. That rationale is applicable regardless of the identity of the party accused of fraud.

3. In holding the exhaustion doctrine applicable to fraud claims, the decision below is in conflict, in principle, with decisions of the Second Circuit,[3] and with the entire body of precedent, which, so far as our research reveals, is, without exception, to the contrary.[4] It is inconsistent, moreover, with Section 10 of the Uniform Arbitration Act, which authorizes judicial review, without exhaustion, of claims that the "award was procured by * * * fraud or improper means." Whether the Arbitration Act standard is applicable to Section

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[2] Apart, of course, from the fact that there the Joint Committee action was in the form of a grievance disposition and here of a contract amendment; plainly an irrelevancy.

[3] *Desrosiers v. American Cyanamid Co.*, 377 F.2d 864, 870-871 (2 Cir.); *Hiller v. Liquor Salesmen's Local No. 2*, 338 F.2d 778, 779 (2 Cir.).

[4] *Humphrey v. Moore*, 375 U.S. 335; *Bridgeport Rolling Mills Co. v. Brown*, 314 F.2d 885 (2 Cir.), cert. denied 375 U.S. 821; *Stereotypers v. Newark Morning Ledger Co.*, 201 F. Supp. 832 (D.N.J.), aff'd 397 F.2d 594 (3 Cir.); *Zeaner v. Teamsters Local 107*, 234 F. Supp. 901 (E. D. Pa.); *Fuller v. Highway Truckdrivers & Helpers, Local 107*, 233

301 is itself an important question warranting disposition by this Court.[5]

Claims that one of the parties defrauded those empowered to interpret, enforce and amend the contract are not only totally different from mere claims based upon the contract; they are inherently more appropriate for judicial resolution than for determination by the allegedly deceived authorities themselves. Such issues are in the "public domain" and they "cannot be fully explored in an internal * * * proceeding." *NLRB v. Marine Workers*, 391 U.S. 418, 425, 426, n. 8.

F. Supp. 115 (E. D. Pa.); *Beiski v. Eastern Auto Forwarding Co.*, 231 F. Supp. 710 (D. Del.), aff'd 354 F.2d 414 (3 Cir.); *Panza v. Armco Steel Corp.*, 208 F. Supp. 50 (W. D. Pa.); *Minkoff v. Scranton Frocks, Inc.*, 181 F. Supp. 542 (S. D. N. Y.), aff'd 279 F.2d 115 (2 Cir.); *Archuleta v. Grand Lodge IAM*, — Cal. App. 2d — , 262 Advance Cal. App. 228, 68 Cal. Rptr. 694 (1968); *Alberti v. North American Iron & Steel Co., Inc.*, 58 LRRM 2720 (N.Y. Sup. Ct., 1965); *In re American Newspaper Guild (North American Newspaper Alliance)*, 56 LRRM 2773 (N.Y. Sup. Ct., 1964); *Johnson v. American Can Co.*, 361 S.W. 2d 451 (Tex. Civ. App., 1962); *Clover v. Columbus Retail Merchants Delivery*, 115 Ohio App. 467, 187 N.E. 2d 658 (1962); *Dickinson v. C & O R. R. Co.*, 7 W. Va. 390, 429-430 (1874).

[5]The Section 10 standards of the Arbitration Act have been applied to suits arising under Section 301 of the National Labor Relations Act. *Transportation Workers v. Transportation Co.*, 283 F. Supp. 597 (E. D. Pa.); *U.E. v. Star Expansion Industries*, 246 F. Supp. 400 (S. D. N.Y.). Other provisions of the Arbitration Act have similarly been found applicable in determining the law under the NLRA. *Rhine v. Union Carbide Corp.*, 343 F.2d 12, 16 (6 Cir.); *Local 149, American Fed'n of Technical Eng'r v. General Electric Co.*, 250 F.2d 922, 928-929 (1 Cir.); *Hoover Motor Express Co. v. Teamsters Local 327*, 217 F.2d 49, 53 (6 Cir.); *Hill v. Aro Corp.*, 275 F. Supp. 482 (N. D. Ohio), 67 LRRM 2037; *Metal Products Local 1645 v. Torrington Co.*, 242 F. Supp. 813 (D. Conn.), aff'd 358 F.2d 103 (2 Cir.).

As agent of the union and the employers, the Joint Committee is inherently incapable of dealing, dispassionately and effectively, with claims that it was defrauded by either side. Its mere attempt to do so would inevitably create suspicion of bias and prejudice and thereby injure the industrial self-government system itself. *Cf. Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150. Thus, "[t]here cannot be any justification to make the public processes wait until the union member exhausts internal procedures plainly inadequate to deal" (*Marine Workers, supra)* with charges that the employer defrauded the Joint Committee.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted and the judgment below reversed.

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March 12, 1969

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APPENDIX

OPINION OF THE COURT OF APPEALS

No. 18052

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

David H. Durham, et al.,
Plaintiffs-Appellants,

v.

The Mason and Dixon Lines, Inc.,
Defendant-Appellee.

On Appeal from the U.S. District Court for the Western District of Kentucky.

Decided December 12, 1968.

Before: Weick, Chief Judge, and O'Sullivan and McCree, Circuit Judges.

McCree, Circuit Judge. Appellants instituted a class action in the District Court under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1964), for enforcement of certain seniority benefits to which they claimed they were entitled under the collective bargaining contract entered into between their union and appellee. The complaint alleged that appellee had procured a change in the collective bargaining agreement by means of fraudulent misrepresentations to the Joint Employer-Union Committee, a

body authorized by agreement to approve such changes, and that the change was in derogation of appellants' vested seniority rights. Appellee filed a motion to dismiss the action, alleging, *inter alia,* that the complaint failed to state a claim upon which relief could be granted and that appellants had failed to exhaust the grievance procedure provided in the collective bargaining agreement. The district judge, after receiving affidavits and exhibits from the parties, granted appellee's motion to dismiss. He did not, however, state which of the alleged grounds was the basis for the dismissal.

This omission is regrettable. The sustaining of a motion to dismiss for failure to state a claim upon which relief can be granted is a judgment on the merits.[1] *See* 2A J. Moore, Federal Practice, ¶12.09, at 2313 (2d ed. 1968). On the other hand, sustaining a motion to dismiss for failure to exhaust the grievance procedure provided in a collective bargaining agreement results only in a dismissal of the action without prejudice. *See* 6 J. Moore, Federal Practice ¶56.03, at 2052 (2d ed. 1966).

We hold that appellants failed to avail themselves of the grievance procedure provided in the contract prior to filing their action in the District Court. This failure to exhaust the grievance procedure deprived the District Court of jurisdiction and therefore precluded a decision on the merits. *Salvatore v. Allied Chemical Corp.*, 238 F. Supp. 232 (S.D. W.Va. 1965). Since the District Court could not reach the

---

[1] We observe that the portion of appellee's motion to dismiss in which he alleged failure to state a claim upon which relief could be granted was converted into a motion for summary judgment under Rule 56 when appellee filed affidavits and exhibits in support of the motion. *See* Fed. R. Civ. P. 12(b). Of course, this merely serves to reinforce the fact that had the motion been granted for this reason the result would have been a judgment on the merits, since under Rule 56 only matters related to the merits can be raised. *See* 2A J. Moore, Federal Practice ¶ 12.09, at 2313 (2d ed. 1968).

merits, we will for this reason assume that the motion to dismiss was granted because of appellants' failure to exhaust the grievance procedure rather than because the complaint failed to state a claim. We affirm.

The general rule is that prior to filing an action in a federal court under Section 301 employees must attempt to use the grievance procedure agreed to by the employer and the union. *Republic Steel Corp. v. Maddox,* 379 U.S. 650, 652 (1965). Appellants contend that because the Joint Employer-Union Committee, the body which ratified the change in the contract, is also the body through which grievances are to be processed, the grievance procedure was, when the Committee approved the change, in effect exhausted. The defect in this reasoning is that although the Committee approved the change in the contract, it did not at that time have before it and has not since been given an opportunity to rule on appellants' contention that its approval was procured by means of fraudulent misrepresentations on the part of appellee. [2] Until this allegation has been presented to the Committee, appellants cannot maintain that they have attempted to use the grievance procedure provided in the contract.

Having concluded that appellants' failure to exhaust the grievance procedure deprived the District Court of jurisdiction over the subject matter of the complaint, we affirm the granting of appellee's motion to dismiss the action.

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[2]The affidavit of employee Sheperd, the validity of which is questionable since it is based largely on hearsay, contained nothing which would require a different conclusion. Although Sheperd stated that grievances related to the employees' seniority rights had been processed to final hearings before the Committee, he did not assert that the allegation of appellee's fraud in obtaining the change in the contract had ever been passed on by the Committee. Also, the exhibit filed by appellee, which contained a list of all grievances filed as a result of the change in the contract, revealed that the fraud issue never had been presented to the Committee.

ORDER OF THE UNITED STATES DISTRICT COURT

ORDER

Filed March 31, 1967

On March 31, 1967, this case was heard in chambers on defendant's motion to dismiss. There appeared H. Solomon Horen for the plaintiffs and Edgar E. Zingman for the defendant.

The Court being advised,

IT IS ORDERED that the defendant's motion to dismiss is hereby sustained.

March 31, 1967

James F. Gordon
United States District Judge

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SUPREME COURT OF THE UNITED STATES

October Term 1968

No. 1150

DAVID H. DURHAM, Et Al., - - - Petitioners,

versus

THE MASON AND DIXON LINES, INC., - Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Sixth Circuit (P. App. 1a-3a) is reported at 404 F. 2d 864. The District Court's order of dismissal (P. App. 4a) is not reported.

JURISDICTION.

The Petitioners have invoked the authority of this Court to review cases in the courts of appeal under 28 USC §1254(1), 62 Stat. 928.

STATUTE INVOLVED.

The statute involved in this case is section 301(a) of the Labor Management Relations Act of 1947, 29 USC §185.

QUESTIONS PRESENTED.

The Petition lists two questions for review (Pet. 2). Stated summarily they are: (1) Is an employee required to exhaust his contractual grievance procedures before seeking judicial relief on a claim that the employer has through a misrepresentation of material fact obtained the approval of the employee's union to a contract amendment? (2) Is this suit barred because Petitioners failed to exhaust their contractual remedies?

COUNTER-STATEMENT OF THE CASE.

Petitioners, employees of Respondent, sought to bring suit in the District Court for the Western District of Kentucky under Section 301 of the Labor Management Relations Act of 1947, 29 USC §185. In their Complaint and in their First Amended Complaint, Petitioners alleged that as of December 11, 1963, Respondent negotiated with the Petitioners' union, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, a "Change of Operations" which contained provisions relating to the seniority, compensation and other employment rights of Petitioners. This "Change of Operations" was approved by the Central States Joint Area Committee, a

joint group of representatives of the union and of the various employers, including Respondent, covered by the bargaining unit. This Joint Committee acts as an appellate review board for grievances arising under the contract and its decisions are final. The First Amended Complaint of Petitioners alleged that the approval of the Joint Committee was obtained due to misrepresentation of facts by Respondent. There was no allegation whatsoever in the Complaint or the First Amended Complaint of fraud on the part of the Respondent, nor was there any allegation of fraud by the union. Without complaining about the "Change of Operations" or filing a grievance under the contract, in May, 1966, some twenty-nine months later, Petitioners filed suit in the District Court.

The Respondent moved to dismiss on the ground that there was no allegation in the Petitioners' pleadings that the Petitioners had attempted to exhaust their contractual grievance procedures before seeking judicial relief. The motion to dismiss was also based upon a contention that the Complaint did not state a claim upon which relief could be granted. Without stating which ground it was relying upon, the District Court sustained Respondent's motion and dismissed the action. On appeal, the Sixth Circuit Court of Appeals affirmed on the ground that the Petitioners had made no showing that they had attempted to comply with their contractual grievance procedures.

ARGUMENT.

I.

The Case of *Republic Steel Corp.* v. *Maddox* Requires Petitioners to Exhaust Their Contractual Remedies Before Seeking Judicial Relief.

It is well established that, before an individual may bring an action to enforce rights arising out of a contract negotiated by his union, he must first seek a remedy through the procedures provided in the contract which he is attempting to enforce. In this connection this Court in *Republic Steel Corp.* v. *Maddox,* 379 U. S. 650 (1965), stated the general rule as follows:

> ". . . federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of contract grievance procedures agreed upon by employer and union as the mode of redress." 379 U. S. at page 652 (emphasis in the original)

In laying down this rule the Court there noted that ". . . it cannot be said in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so." 379 U. S. at page 653. In summary, the Court in *Maddox* held that ". . . unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to

act on his behalf." 379 U. S. at page 653.[1] The rationale behind the *Maddox* rule is that good labor policy requires that the union be given an opportunity to press the employee's grievance. Any contrary rule would undermine the union's support by the employees. The only exception to the rule is where the union itself is engaging in discriminatory or other improper activities.

The lower courts have consistently followed this requirement that an employee's failure to resort to contractual remedies, prior to bringing an action under Section 301 of the Labor Management Relations Act, requires a dismissal. *Teamsters* v. *Uniform Rental Service,* 59 LRRM 2606 (M.D. Tenn., 1965) (unpublished); *Salvatore* v. *Allied Chemical Corp.,* 238 F. Supp. 232 (S.D. W. Va., 1965); *Wade* v. *Southern Pacific Co.,* 248 F. Supp. 493 (S.D. Texas, 1965).

Clearly, therefore, before an employee, by means of a suit under Section 301, may seek redress for the violation of rights established under a collective bargaining agreement, he must allege either that there is no contractual procedure which may be invoked to resolve the dispute, or that he has at least attempted to utilize the procedure established by the contract which he is attempting to enforce.[2]

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[1]See, *Rhine* v. *Union Carbide Corp.,* 343 F. 2d 12 (6th Cir., 1965), *reversing* 208 F. Supp. 785 (W.D. Ky., 1962). See also, *Broniman* v. *Great Atlantic & Pacific Tea Co.,* 353 F. 2d 559 (6th Cir., 1965), *cert. denied* 382 U. S. 907 (1966).

[2]*Woody* v. *Sterling Aluminum Products, Inc.,* 365 F. 2d 448 (8th Cir., 1966), *affirming* 244 F. Supp. 84 (E.D. Mo., 1965), *cert. denied* 386 U. S. 957 (1967); *Desrosiers* v. *American Cyanamid Co.,* ____ F. Supp. ____, 62 LRRM 2111 (D. Conn., 1966), *aff'd in part and reversed in part,* 377 F. 2d 864 (2d Cir., 1967); *Bsharah* v. *Electric Autolite Co.,* ____ F. Supp. ____, 64 LRRM 2231 (N.D. Ohio, 1967).

Petitioners have failed to allege either that they have exhausted or attempted to utilize the contractual grievance procedures with respect to their belated collateral attack upon the "Change of Operations." Nor did Petitioners allege, or even imply, that the contractual grievance procedures were unavailable to them. Thus, Petitioners have failed to meet the requirements imposed by this Court under the *Maddox* decision.

Infact, Petitioners made no effort to utilize their contractual procedures and thereby disregarded the basic requirement of federal labor policy which holds that their union must be afforded the opportunity to act in their behalf prior to the filing of an action under Section 301.

Petitioners have attempted to distinguish *Maddox* by stating that it applies only to the " 'normal situation' *i.e.,* where the grievance is based 'simply on the contract.' " This is a false distinction. In its reference to the "normal situation" this Court clearly was referring to the situation where the union is acting properly and not attempting to subvert the rights of the employees. This is what is "normality." The Court was discussing normality in the sense of the industrial situation, not the legal theories under which the parties were making claims. Clearly we do indeed have the "normal situation" in the present case and, therefore, *Maddox* totally governs the result in this case.

Petitioners have cited *Glover* v. *St. Louis-San Francisco Railway Co.,* decided January 14, 1969, —— U. S. ——, 89 S. Ct. 548. In reality, the *Glover* case

supports Respondent's position. In that case, the plaintiffs brought an action against both the employer and the union charging discrimination as a result of collusion between the union and the employer. *Glover* was an "abnormal" situation. *Glover* cannot in any way be considered as a precedent governing the present case. In addition, *Glover* involved a situation where resort to the grievance procedure demonstrably would be "futile." Such is not the case here.

II.

There Is No Conflict Between the Decision Below and the Cases Decided By the Second Circuit.

Petitioners have asserted that there is a conflict between the opinion below and the opinions of the Second Circuit Court of Appeals. This simply is not true. All of the opinions from the Second Circuit cited by Petitioners involved suits against unions and employers. That is a totally different situation from the present case. Here we have a suit against the employer only. The rights which are involved are contractual rights; therefore, this can only be an action to enforce the contract. Since there is a grievance procedure set up by the contract, *Maddox,* requires Petitioners to exhaust their grievance procedures and contractual remedies before they may come into court and seek judicial relief.

Petitioners have asserted that the Court below has treated "Maddox as having reversed *Humphrey* v. *Moore,* 375 U. S. 335 *sub silentio.*" The decision below has no such effect. As petitioners quite correctly point

out, the exhaustion claim was neither raised nor considered in *Humphrey* v. *Moore* and, therefore, that case cannot be considered as precedent governing the present situation. The rationale of *Humphrey* v. *Moore* and of *Maddox* is that where the union is engaging in improper activities, such as fraud, resort to the grievance procedure is useless. Both sides in the grievance procedure would be adverse to the employee. Such is not the situation in the present case. There has been no allegation of fraud on the part of the union in this case. There are not even any allegations of fraud by the employer. The union is, therefore, a perfectly proper and appropriate party to represent the Petitioners in presenting their grievances to the company. The rationale of *Humphrey* v. *Moore* and the rationale of the cases from the Second Circuit, cited by Petitioners, simply do not apply in the present case. In truth, there is no conflict between the Second Circuit and the Sixth Circuit on this issue and, therefore, there is no reason to grant certiorari.

Clearly none of the reasons for granting certiorari are present in this case. There is no conflict between the decision below and the position adopted by any other court of equal jurisdiction. Nor is this an important question of federal law which has not been, but should be, settled by the Supreme Court. The present case is clearly governed by *Maddox* as found by the Court of Appeals for the Sixth Circuit, and there is no need at this time for Supreme Court review.

CONCLUSION.

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

1. Respondent's claim (pp. 3, 8), that petitioners did not charge it with "fraud" was properly rejected by the court below, which explicitly found: "The complaint alleged that appellee had procured a change in the collective bargaining agreement by means of fraudulent misrepresentations to the Joint Employer Union Committee" (App. 1a, 3a; J.A. 8a, par. 20(d), 9a, par. 24, 13a).

2. The premise of respondent's revision of our "Questions Presented" (p. 2) is that the contractual grievance procedure was available to petitioners to challenge the validity of the Joint Committee's approval of the change of operations. But that premise is not, and cannot be, supported.

Article 42, Section 3, of the relevant "Supplemental Agreement," Appendix A to the Complaint, p. 60 (in the original record certified to this Court), provides for establishment by the operators and the Unions "together" of a "permanent Joint Area Committee." Sections 5 and 6 of that Article, *ibid.*, empower the "sub-committee on change of operations" appointed by that Committee to entertain employer requests for a "change of operations." Section 6 provides, in pertinent part:

> "Present terminals, breaking points, or domiciles shall not be transferred or changed without the Employer first having asked for and received approval from the sub-committee on change of operations. . . ."

Nothing in the contract even remotely suggests that employees or a Local Union aggrieved by Joint Committee approval of a change of operations may challenge such action through the grievance procedure. The grievance procedure is nowhere made applicable to such action. The contract contains no provision for presentation to the Joint Committee, or any other tribunal, of a complaint by a local union or by aggrieved employees that approval of the Joint Committee was obtained by fraud or was otherwise unauthorized by the contract.

Moreover, the Joint Committee is the highest tribunal provided in the contract even for disposition of "grievances." App. A to Complaint, Article 43, Sections 1 and 2, pp. 61-62; App. 12a-13a. In its motion to dismiss respondent asserted (J.A. 16a, par. (4)):

> "The Change of Operations was approved by the Central States Area Joint Committee * * * and the approval constitutes a settlement of all rights arising out of the contract and relating to the Change of Operations.
>
> "The instant complaint seeks remedies outside the scope of this settlement and must, therefore, be dismissed."

Thus, as the complaint alleged (App. 3a; J.A. 8a, par. 22), Joint Committee approval of respondent's request "exhausted the contractual grievance procedures" unless, as the court below held, *Maddox* imports into the exhaustion requirement a "primary jurisdiction" rule, which, as a matter of law, forecloses recourse to courts under Section 301 until the adjudicating or amending authority is afforded "an opportunity to rule on [the] contention that its approval was procured by means of fraudulent misrepresentation * * *" (App. 3a), *even though the contract itself does not so provide.*

3. Respondent concedes that the imported "primary jurisdiction" requirement is inapplicable where the Union is charged with fraud or breach of the duty of fair representation, but argues for its application where the Joint Committee is allegedly a victim of employer fraud, on the theory that *Maddox* requires the victimized employees to afford the Union "the opportunity to [litigate the fraud claim] in their behalf" (Opp. 4-5, 6, 8). But nothing in *Maddox*, and none of the cases respondent cites, holds or even implies that aggrieved employees are barred from litigating on their own behalf their claim that an arbitration award or contract amendment is ineffective to alter vested contract rights because it was procured by fraud. Such a rule would conflict with the individual right of contract enforcement upheld in *Smith v. Evening News*, 371 U.S. 195, 198-200 and *Humphrey v. Moore*, 375 U.S. 335, 343. It would also conflict with the teaching of *Vaca v. Sipes*, 386 U.S. 171, 185, that employer conduct which "amounts to repudiation" of contractual procedures estops the employer from relying on "unexhausted grievance and arbitration procedures." Fraud upon the Joint Committee is the clearest kind of repudiation, *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238. Moreover, respondent's theory is inconsistent with *Vaca's* recognition *(ibid)* that "there may of course be other" situations to which the exhaustion requirement is inapplicable.

The overbroad interpretation of *Maddox* urged by respondent and adopted by the court below is not only unsupported by legal and labor policy considerations (Pet. pp. 6-7); it would seriously undermine industrial peace. Thus, it would compel the bargaining agent to choose between bringing a charge of fraud against the employer, thereby disrupting and jeopardizing the entire union-employer relationship, or incurring suspicion of complicity and a possible charge of unfair representation from its constituents by refusing.

Manifestly, a charge that the employer has procured a contract amendment or arbitration award by fraud upon the amending or adjudicating authority is not, in normal parlance, a "grievance" based "simply on the contract" (*Maddox*, 379 U.S. at 657); it is a far cry indeed from the "normal situation" (379 U.S. at 653) to which *Maddox* is confined.

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